IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

Carroll Logsdon; Pattie Houdlett; Steve Wilson; and Kelly Wiskur,

Plaintiffs,

v. **Case No. 02-2519-JWL**

AT&T Communications of the Southwest, Inc.,

Defendant.

MEMORANDUM AND ORDER

Plaintiffs filed suit against defendant alleging that defendant, without notice to or consent from plaintiffs, unlawfully converted plaintiffs' local telephone service from Southwestern Bell Telephone Company to AT&T–conduct known as "slamming" and prohibited by K.S.A. § 50-6,103. Plaintiffs seek civil penalties pursuant to K.S.A. § 50-6,103(d), damages for tortious interference with contract and damages for violations of the Kansas Consumer Protection Act, K.S.A. § 50-623 et seq. This matter is presently before the court on defendant's motion for summary judgment (doc. #56) and plaintiffs' motion for summary judgment (doc. #58). As set forth in more detail below, defendant's motion is granted in its entirety and plaintiffs' motion is denied. Plaintiffs' complaint, then, is dismissed with prejudice.

I. Facts

Plaintiff Carroll Logsdon, a barber, is the sole owner of Fairway Hairstyling, a salon

located in Fairway, Kansas. Plaintiffs Pattie Houdlett, Steve Wilson and Kelly Wiskur are sole proprietors who operate their businesses as barbers or cosmetologists out of Fairway Hairstyling. Mr. Logsdon has sole authority for decisions affecting Fairway Hairstyling, including decisions concerning the provision of local telephone service. In March 2001, defendant AT&T Communications of the Southwest, Inc. (hereafter "AT&T") attempted to convert Fairway Hairstyling's local telephone service from Southwestern Bell to AT&T and the primary dispute in this case is whether Mr. Logsdon authorized defendant to do so.

Defendant asserts that Mr. Logsdon did authorize the switch in service. In support of its contention, defendant has provided three key pieces of evidence. The first is an affidavit of Angelique Germer, an employee of EDS, a telemarketing company that regularly performs telemarketing services for defendant AT&T. Ms. Germer avers that she, on behalf of AT&T, phoned Fairway Hairstyling on January 10, 2001 and spoke with an individual who identified himself as Carroll Logsdon and who held himself out to be the individual with authority for making decisions on behalf of Fairway Hairstyling. According to Ms. Germer, Mr. Logsdon agreed during the course of the conversation to permit AT&T to become Fairway Hairstyling's local telephone service provider.

The second significant piece of evidence submitted by defendant is a recording (preserved on a compact disc) of what defendant contends is a conversation between Mr. Logsdon and an individual at the AT&T verification center in which Mr. Logsdon verifies that he has authorized the change in service. In that regard, Ms. Germer averred that after obtaining Mr. Logsdon's authorization, and while Mr. Logsdon was still on the phone line, she called Tanya Lockwood at

the AT&T verification center and that Ms. Lockwood recorded her conversation with Mr. Logsdon. On the recording, the individual identified as Mr. Logsdon states that he is authorized to make decisions for Fairway Hairstyling, he confirms the telephone number for Fairway Hairstyling, and he confirms on two separate occasions his understanding that he has authorized AT&T to switch his local toll service to AT&T.

The third piece of evidence on which defendant relies for its assertion that Mr. Logsdon authorized the change in service providers is Mr. Logsdon's appointment book pages for January 2001. On the page containing the entry for January 10, 2001 (the day on which defendant contends Mr. Logsdon spoke with Ms. Germer and Ms. Lockwood and authorized the change in service), Mr. Logsdon wrote various notes from his conversation with AT&T. For example, Mr. Logsdon noted the toll free number provided to him by Ms. Germer in case he had any questions or changes to the services verified by Ms. Lockwood.

Based primarily on these three pieces of evidence, defendant contends that it is beyond dispute that Mr. Logsdon authorized AT&T to become the local telephone service provider for Fairway Hairstyling and thus, summary judgment in favor of defendant on plaintiffs' claim that AT&T violated Kansas' anti-slamming statute is warranted. Plaintiffs maintain that AT&T was not authorized to switch Fairway Hairstyling's local service from Southwestern Bell to AT&T. In support of their claim, plaintiffs contend that the affidavit of Ms. Germer cannot be considered by the court because it was not disclosed to plaintiffs until the filing of AT&T's motion for summary judgment and, thus, plaintiffs have not had the opportunity to "investigate the declaration." With respect to the recording, plaintiffs assert that AT&T has not shown it to be a

"true, authentic, and correct recording of the telephone conversation." While Mr. Logsdon admits that the voice on the recording sounds like his voice and, in fact, did not deny that it was his voice on the call, he maintains that he has no memory of speaking with anyone at AT&T about changing his local telephone service. Mr. Logsdon, however, does not appear to dispute that the notes contained in his appointment book reflect the conversation on January 10, 2001.

Regardless of whether the change in service was authorized, the parties do seem to agree that AT&T first attempted to convert Fairway Hairstyling's local telephone service on Friday, March 16, 2001 and that the attempted conversion was not a smooth one. Indeed, Fairway Hairstyling was without local telephone service for most of the week from March 16, 2001 through March 23, 2001. On Friday, March 16, 2001, Mr. Logsdon realized that Fairway Hairstyling was not receiving any incoming local calls and, thus, he contacted Southwestern Bell to request repair service on that day. Cheryl Maddox was dispatched by Southwestern Bell on March 16, 2001 and Ms. Maddox testified that she restored service by the end of the day on Friday. As of Saturday morning, March 17, 2001, however, Fairway Hairstyling's local telephone service was again not available. On Saturday, then, Mr. Logsdon again requested repair service from Southwestern Bell and Ms. Maddox returned to Fairway Hairstyling in an effort to restore service. At some point, Ms. Maddox realized that Fairway Hairstyling's phone line was ported to two different switches–AT&T and Southwestern Bell–and the switches were automatically and continually competing to keep Fairway Hairstyling's service because both entities believed that Fairway Hairstyling, via Mr. Logsdon, was their customer.

On Monday, March 19, 2001, Mr. Logsdon telephoned AT&T and complained that he did

not have any local telephone service at Fairway Hairstyling. AT&T advised Mr. Logsdon that they were having some technical difficulties connecting the local service at Fairway Hairstyling. According to Mr. Logsdon, he then asked AT&T to release the line so that Southwestern Bell could resume and restore service. Mr. Logsdon testified that in response to his request, AT&T placed him on hold and he never did get an answer from them on that day. While it is not entirely clear from the record, it appears that Mr. Logsdon disconnected the call while he was placed on hold. On that same day, Cheryl Maddox obtained Mr. Logsdon's signature on a Letter of Authorization/Change of Provider Form designating Southwestern Bell as the local service provider for Fairway Hairstyling. Ms. Maddox faxed this form to Southwestern Bell. She did not personally provide any written communications to AT&T. After Mr. Logsdon and Ms. Maddox had additional verbal communications with AT&T during the week of March 19, 2001, Fairway Hairstyling's local telephone service was fully restored by and returned to Southwestern Bell on Friday, March 23, 2001.

Plaintiffs filed suit against AT&T asserting three separate violations of the anti-slamming statute. According to plaintiffs, AT&T first violated the statute on March 16, 2001, when it initially attempted to convert Fairway Hairstyling's local telephone service to AT&T. Plaintiffs assert that a second violation occurred on March 17, 2001, when service was again interrupted after Southwestern Bell had restored service on the evening of March 16, 2001. Finally, plaintiffs assert that a third violation occurred on Monday, March 19, 2001, when, according to plaintiffs, AT&T had actual notice that Mr. Logsdon wanted Southwestern Bell to be the service provider yet continued to "control" Fairway Hairstyling's phone number so that Southwestern Bell could not

restore service. Based on the same underlying conduct by AT&T, plaintiffs also assert a claim for tortious interference with contract and damages for violations of the Kansas Consumer Protection Act, K.S.A. § 50-623 et seq.

Defendant moves for summary judgment on all of plaintiffs' claims. Plaintiffs move for summary judgment only on their claim under the anti-slamming statute.

II. Summary Judgment Standard[1]

Summary judgment is appropriate if the moving party demonstrates that there is "no genuine issue as to any material fact" and that it is "entitled to a judgment as a matter of law." Fed. R. C`iv. P. 56(c). In applying this standard, the court views the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Spaulding v. United Transp. Union*, 279 F.3d 901, 904 (10th Cir. 2002). A fact is "material" if, under the applicable substantive law, it is "essential to the proper disposition of the claim." *Wright ex rel. Trust Co. of Kansas v. Abbott Laboratories, Inc.*, 259 F.3d 1226, 1231-32 (10th Cir. 2001) (citing *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998)). An issue of fact is "genuine" if "there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way." *Adler*, 144 F.3d at 670 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248

[1]Plaintiffs and defendant have filed motions for summary judgment. The court will address the motions together. The legal standard does not change if the parties file cross-motions for summary judgment. Each party has the burden of establishing the lack of a genuine issue of material fact and entitlement to judgment as a matter of law. *See Atlantic Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1148 (10th Cir. 2000).

(1986)).

The moving party bears the initial burden of demonstrating an absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *Spaulding*, 279 F.3d at 904 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). In attempting to meet that standard, a movant that does not bear the ultimate burden of persuasion at trial need not negate the other party's claim; rather, the movant need simply point out to the court a lack of evidence for the other party on an essential element of that party's claim. *Adams v. American Guarantee & Liability Ins. Co.*, 233 F.3d 1242, 1246 (10th Cir. 2000) (citing *Adler*, 144 F.3d at 671).

Once the movant has met this initial burden, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." *Spaulding*, 279 F.3d at 904 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)); *Anderson*, 477 U.S. at 256; *Celotex*, 477 U.S. at 324. The nonmoving party may not simply rest upon its pleadings to satisfy its burden. *Anderson*, 477 U.S. at 256; *accord Eck v. Parke, Davis & Co.*, 256 F.3d 1013, 1017 (10th Cir. 2001). Rather, the nonmoving party must "set forth specific facts that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant." *Mitchell v. City of Moore, Oklahoma*, 218 F.3d 1190, 1197-98 (10th Cir. 2000) (quoting *Adler*, 144 F.3d at 671). To accomplish this, the facts "must be identified by reference to an affidavit, a deposition transcript, or a specific exhibits incorporated therein." *Adams*, 233 F.3d at 1246.

Finally, the court notes that summary judgment is not a "disfavored procedural shortcut;" rather, it is an important procedure "designed to secure the just, speedy and in-expensive

determination of every action." *Celotex*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

III. Plaintiffs' Claim Under K.S.A. § 50-6,103

Plaintiffs' primary claim in this lawsuit is that defendant violated K.S.A. § 50-6,103, a part of the Kansas Consumer Protection Act that prohibits a telecommunications provider from changing a consumer's telecommunications carrier from one carrier to another carrier without having obtained the express authorization of the consumer authorized to make the change. *See* K.S.A. § 50-6,103(b). According to defendant, the uncontroverted facts demonstrate that defendant had the express authorization of the consumer authorized to make the change and, thus, summary judgment is warranted in favor of defendant. According to plaintiffs, the evidence relied upon by defendant (primarily the tape recorded conversation) presents, at the very most, a question of fact as to whether Mr. Logsdon authorized the change in local telephone service. Plaintiffs further assert that summary judgment in their favor is warranted as defendant, even assuming the initial conversion was authorized, was clearly not authorized to convert (or attempt to convert) Fairway Hairstyling's service again after Ms. Maddox restored service to Southwestern Bell on March 16, 2001.

A. Could a Reasonable Jury Conclude that Mr. Logsdon Did Not Authorize Defendant to Convert Fairway Hairstyling's Local Telephone Service from Southwestern Bell to AT&T?

As explained above, defendant, in support of its motion for summary judgment, relies in large part on three pieces of evidence that, according to defendant, clearly show that Mr. Logsdon

authorized defendant to become Fairway Hairstyling's local telephone service provider. In light of this evidence, defendant asserts that no reasonable jury could conclude that Mr. Logsdon did not authorize AT&T to change Fairway Hairstyling's telecommunications carrier. In response to defendant's motion for summary judgment, and in support of their own motion, plaintiffs only challenge the sufficiency of defendant's evidence. Plaintiffs do not have any affirmative evidence tending to show that Mr. Logsdon did not authorize the change in service.[2] The court, then, analyzes whether defendant's evidence is such that no reasonable jury could conclude that Mr. Logsdon did not authorize AT&T to change Fairway Hairstyling's local telecommunications carrier.

Defendant has submitted the affidavit of Angelique Germer, an individual who, in January 2001, was employed as telemarketer at EDS, a telemarketing company that regularly performs telemarketing services for AT&T. According to Ms. Germer, she telephoned Fairway Hairstyling on January 10, 2001 by dialing Fairway Hairstyling's phone number of 913-722-0218. She spoke with an individual who identified himself as Carroll Logsdon and confirmed that he was the owner of Fairway Hairstyling. According to Ms. Germer, during the course of the conversation, Mr. Logsdon agreed to have AT&T become Fairway Hairstyling's local telephone service provider. In that regard, Ms. Germer averred that she called Tanya Lockwood at the AT&T verification center

[2]While plaintiffs assert in their motion for summary judgment that Mr. Logsdon did not authorize the change in service, they reference only one page of Mr. Logsdon's deposition in support of this assertion. On that page of his deposition, Mr. Logsdon simply makes the conclusory statement that his contention in this lawsuit is that he did not authorize AT&T to make the change. Interestingly, plaintiffs did not even submit an affidavit from Mr. Logsdon denying that he authorized the switch.

while Mr. Logsdon was still on the line and that the three of them then had a conversation which was recorded. Ms. Germer further averred that she has listened to the recording of the conversation that she had with Ms. Lockwood and Mr. Logsdon on January 10, 2001 and that, to the best of her recollection, the recording is an authentic and correct recording of the telephone conversation.

Plaintiffs assert that the court cannot consider the Germer affidavit because defendant did not disclose the affidavit until the filing of its motion for summary judgment and, thus, plaintiffs have not had the opportunity to "investigate" the declaration.[3] There is no federal or local rule, however, that requires defendant to disclose this affidavit at any time prior to the filing of its motion for summary judgment. Plaintiffs' argument, then, is frivolous and the affidavit of Ms. Germer is proper Rule 56(e) evidence that the court will consider in its analysis of defendant's motion for summary judgment.

The court, turns, then to the tape-recorded conversation referenced by Ms. Germer in her affidavit. The recording begins with Ms. Lockwood introducing herself to the other parties on the phone and notifying them that the call is being recorded. Ms. Lockwood then asks Ms. Germer for the business telephone number of the customer in question, and Ms. Germer provides the telephone number of Fairway Hairstyling. After verifying Ms. Germer's name and call-center location, Ms. Lockwood asks Ms. Germer for her customer's name with correct spelling and the

[3]Plaintiffs also complain that Ms. Germer's affidavit is not notarized. Ms. Germer's affidavit, however, is signed under penalty of perjury and, accordingly, is entirely appropriate and specifically authorized under the local rules of this court, *see* D. Kan. R. 56.1, and by federal statute, *see* 28 U.S.C. § 1746.

title of the company. Ms. Germer then replies, "Yes, it's Caroll, C-A-R-O-L-L." At this point in the conversation, the person that Ms. Germer has identified as Mr. Logsdon (and who, according to Ms. Germer, identified himself as Mr. Logsdon to her) interrupts the conversation to correct the spelling of the first name as "C-A-R-R-O-L-L." Ms. Germer then spells Mr. Logdson's last name and states that he is the owner of the company. Thereafter, Ms. Lockwood addresses Mr. Logsdon by his name and the following conversation ensues:

Ms. Lockwood:	And Mr. Logsdon, before verification for your security, can you please confirm that you are at least 18 years of age or older?
Customer:	Yes.
Ms. Lockwood:	And you are also authorized to make decisions for this company.
Customer:	Yes.
Ms. Lockwood:	Thank you. I have your company's billing name showing as your name Carroll J. Logsdon and your billing address at 2714 West 53rd Street, Shawnee, Minnesota.
Customer:	Mission.
Ms. Lockwood:	Shawnee Mission, Kansas 66205.
Customer:	Yes.
Ms. Lockwood:	And that's for the billing telephone number of 913-722-0218 and all lines associated, is that correct, sir?
Customer:	Yes.

Thus, the speaker that Ms. Germer has identified as Mr. Logsdon clearly answers to the name of Carroll Logsdon on the recording. The speaker also clearly authorized AT&T to become the local telephone service provider at Fairway Hairstyling, as evidenced by the following:

Ms. Lockwood: And, Mr. Logsdon, at this time we need to ask you a few questions to insure the accuracy of your order. Do you understand that you are authorizing AT&T to switch your local toll service to AT&T and to notify your local telephone company of your decision?

Customer: Yes.

Ms. Lockwood: Thank you. And, Angelique, has the customer ordered any new lines with AT&T today?

Ms. Germer: No, he hasn't.

Ms. Lockwood: Thank you. And, sir, do you understand and agree to that?

Customer: Yes.

Ms. Lockwood: Thank you. Do you understand that you are authorizing AT&T to switch your local service to AT&T and to notify your local telephone company of your decision?

Customer: Yes.

Ms. Lockwood: Thank you.

The customer, then, on two separate occasions, clearly authorized the change in service providers. After a few questions concerning the monthly billing rate and special features on the phone lines, the conversation concludes with Ms. Lockwood asking the customer identified by Ms. Germer as Mr. Logsdon to provide a four-digit number that is unique to him. The customer provides the number "8965," which are the last four digits of Mr. Logsdon's social security number. Finally, Ms. Germer provides the customer with a toll-free number and extension for the customer to use should he have any questions or concerns regarding the services verified. It is undisputed that Mr. Logsdon wrote down that toll-free number and extension on the January 10, 2001 page of his daily appointment calendar.

Plaintiffs first challenge the tape recording on the grounds that defendant has "failed to provide satisfactory authentication of the recorded conversation." The court disagrees. First, defendant has submitted the declaration of Ms. Germer, who stated that the recorded conversation accurately reflects the conversation as she remembers it. Second, defendant has submitted the declaration of Holly Beatty, the Vice President of Client Services at TCIM Services, Inc. (hereinafter TCIM). TCIM is the company that recorded the particular conversation at issue. According to Ms. Beatty, TCIM regularly performs third-party verification services for AT&T and regularly records those verifications in the ordinary course of its regularly conducted business. Ms. Beatty further states that TCIM was competent to record the conversation that occurred on January 10, 2001 between Ms. Lockwood, Ms. Germer and the customer and that TCIM did, in fact, record the conversation. Ms. Beatty states that TCIM's recording device is capable of recording the conversation that occurred, that the recording was made in the ordinary course of TCIM's regularly conducted business, that the recording was preserved in the course of a regularly conducted business activity, and that the recording is authentic and correct. Finally, she states that no changes, additions or deletions have been made to the recording.

Plaintiffs assert that Ms. Beatty's declaration is insufficient to authenticate the tape recording because it fails to identify the operator of the recording device, fails to speak to the competency of the operator of the recording device, and fails to specify the manner of preservation. The Tenth Circuit, however, has adopted a flexible approach with regards to establishing a foundation for the introduction of sound recordings. *See, e.g., United States v. Green*, 175 F.3d 822, 829-30 (10th Cir. 1999); *United States v. Jones*, 730 F.2d 593, 597 (10th

Cir. 1984). Consistent with this approach, the court is convinced that defendant's foundation is sufficient to insure the accuracy of the recording itself. Ms. Beatty appropriately identified TCIM as the operator of the device (indeed, it may be that there is no individual operator as plaintiffs suggest) and plainly stated that TCIM was competent to make such recordings. With respect to the preservation issue, the Tenth Circuit has held that when other indicia of accuracy are present, lack of chain-of-custody testimony is not fatal. *See Jones*, 730 F.2d at 597 (foundation sufficient despite lack of evidence concerning control of the tape after recording was made). Simply put, there is nothing before the court that casts any doubt on the accuracy of the recording.

Next, plaintiffs assert that whether it is Mr. Logsdon's voice on the recording is a genuine issue of material fact. This argument is frivolous. Mr. Logsdon admitted in his deposition that the voice on the tape sounded like his voice and, more importantly, when asked whether he denied that the voice on the recording was his own, Mr. Logsdon stated, "No." Even if Mr. Logsdon did not recollect having the conversation, this would not create a fact issue as to whether the voice on the recording is Mr. Logsdon's voice. Simply put, plaintiffs have no evidence that the voice on the tape is not Mr. Logsdon's voice. In fact, Mr. Logsdon all but admits that the voice is his own. Moreover, the person on the recording responds to the name "Mr. Logsdon" and answered the telephone at Fairway Hairstyling (the telephone number that Ms. Germer dialed). Mr. Logsdon took notes from the conversation in his appointment book on the day the conversation occurred. Plaintiffs offer no explanation as to how Mr. Logsdon could have written such notes in his appointment book had he not been a party to the January 10, 2001 conversation with Ms. Lockwood and Ms. Germer. Finally, Ms. Germer averred that the voice on the recording was the

voice of the person that had identified himself to her as Carroll Logsdon. In light of such evidence, it would be difficult to conceive of a way in which a jury could conclude that it was not Mr. Logsdon on the recording.

Plaintiffs' final argument concerning the tape recording is that it reflects only the "verification" of the consumer's consent without any indication of the substance of the conversation that occurred prior to the recorded verification. In other words, plaintiffs urge that there is no evidence before the court concerning whether the consumer actually authorized the switch before the verification process. The argument is patently frivolous. Regardless of what occurred during the initial conversation between the consumer and Ms. Germer, the consumer, not once, but twice affirms during the recorded conversation that he understands he is authorizing AT&T to switch Fairway Hairstyling's local service to AT&T. Based on the conversation with Ms. Lockwood, then, the consumer should have understood that, regardless of what transpired with Ms. Germer in the initial conversation, he was presently authorizing AT&T to switch his local telephone service to AT&T. The tape recording simply leaves no question that the consumer authorized the change.

To conclude, then, plaintiffs have submitted absolutely no evidence tending to show that Mr. Logsdon did not authorize AT&T to switch Fairway Hairstyling's local telephone service to AT&T. Moreover, the court has rejected each of plaintiffs' arguments concerning the foundation and sufficiency of defendant's evidence. Simply put, then, defendant's evidence–which stands as uncontroverted–is such that no reasonable jury could conclude that Mr. Logsdon did not authorize AT&T to switch Fairway Hairstyling's local telephone service. Thus, summary judgment in favor

of defendant is appropriate with respect to plaintiffs' claim that defendant engaged in unlawful slamming on March 16, 2001, when it first attempted to convert Fairway Hairstyling's service.

B. Defendant's Continued Efforts to Convert Fairway Hairstyling's Local Telephone Service from Southwestern Bell to AT&T

Plaintiffs contend in their motion for summary judgment that even if Mr. Logsdon authorized defendant to convert Fairway Hairstyling's local telephone service from Southwestern Bell to AT&T, defendant was not authorized to do so after Southwestern Bell had restored service on the evening of March 16, 2001. Thus, according to plaintiffs, a separate violation of the anti-slamming statute occurred on March 17, 2001, when AT&T again attempted to convert service from Southwestern Bell. Similarly, plaintiffs contend that another violation of the anti-slamming statute occurred on or about March 19, 2001, when AT&T continued its attempt to convert Fairway Hairstyling's local telephone service even after Ms. Maddox allegedly notified AT&T in writing that Mr. Logsdon had decided to keep Southwestern Bell as Fairway Hairstyling's local telephone service provider. As explained below, these arguments are entirely without merit and plaintiffs have no evidence that defendant violated the anti-slamming statute at any time after March 16, 2001.

According to plaintiffs, defendant violated the anti-slamming statute late on March 16, 2001 or early on March 17, 2001 when it again attempted to convert Fairway Hairstyling's local telephone service after Ms. Maddox had restored service to Southwestern Bell on the evening of March 16, 2001. Plaintiffs assert that summary judgment with respect to this incident is warranted

because "this second incident occurred without any communication between AT&T and plaintiffs and [thus] there can be no doubt that this second change in service occurred without authorization from plaintiffs." As defendant highlights, however, Mr. Logsdon–as of March 17, 2001–had not rescinded his express authorization permitting AT&T to make the change and, thus, AT&T was still operating under the authority provided it by Mr. Logsdon when it continued its attempt to convert Fairway Hairstyling's local telephone service. In short, because plaintiffs have not shown that AT&T's conduct on March 17, 2001 was unauthorized, they are not entitled to summary judgment regarding this incident. On the other hand, because defendant has clearly demonstrated that on or about March 17, 2001 it was operating under the authority given it by Mr. Logsdon back in January 2001, it cannot be held liable under the anti-slamming statute and summary judgment in favor of defendant is appropriate with respect to the second incident as described by plaintiffs.

Plaintiffs contend that the "third slamming" occurred on Monday, March 19, 2001. Specifically, plaintiffs contend that as of March 19, 2001, defendant had actual notice that Mr. Logsdon wanted Southwestern Bell to be the local telephone service provider for Fairway Hairstyling and yet defendant continued to "control" the phone number for Fairway Hairstyling until March 23, 2001. In support of their argument that AT&T had "actual notice" of Mr. Logsdon's selection of Southwestern Bell, plaintiffs assert first that Ms. Maddox, on March 19, 2001, had Mr. Logsdon sign a letter of authorization that expressly declared Southwestern Bell to be the local carrier of choice and that Ms. Maddox sent that document to AT&T via facsimile. Plaintiffs have grossly misrepresented the record on this point. The deposition testimony of Ms. Maddox referenced by plaintiffs in support of this argument in no way indicates that Ms. Maddox

sent the letter of authorization to AT&T. Rather, Ms. Maddox testified that she sent the documents via facsimile to the "winback group"–a department within Southwestern Bell–and that she did not provide AT&T with any written information whatsoever. This evidence, then, wholly fails to show that AT&T had notice that Mr. Logsdon had selected Southwestern Bell as Fairway Hairstyling's local carrier or was otherwise rescinding his authorization of January 10, 2001.

Plaintiffs also assert that both Mr. Logsdon and Ms. Maddox contacted AT&T by phone on March 19, 2001 in an attempt to have AT&T "release" Fairway Hairstyling's phone number so that service could be restored to Southwestern Bell. While the nature of Ms. Maddox's conversations with AT&T are not entirely clear, there is no evidence in the record that she had the authority to speak on behalf of Fairway Hairstyling or Mr. Logsdon with respect to local telephone service and thus, any conversations that she may have had with AT&T are irrelevant to the question of whether Mr. Logsdon rescinded his authorization on March 19, 2001.

Mr. Logsdon testified that he contacted AT&T on Monday, March 19 and advised them that Fairway Hairstyling's local phone service was not working and that the AT&T representative advised Mr. Logsdon that AT&T was having some technical difficulties hooking up Fairway Hairstyling's phone line. According to Mr. Logsdon, he then asked the representative to "release the line so Southwestern Bell could hook it up." At that point, the representative apparently placed Mr. Logsdon on hold and did not return before Mr. Logsdon terminated the call. Thus, according to Mr. Logsdon, "nothing" came out of that phone conversation. As an initial matter, then, it is, at the very least, a question of fact as to whether Mr. Logsdon rescinded his authorization on March 19, 2001. Indeed, there is no evidence that the AT&T representative with whom Mr.

Logsdon was speaking was the correct person to whom

Mr. Logsdon needed to address his concerns and it is unclear why the representative placed Mr. Logsdon on hold (perhaps he was attempting to obtain a supervisor with whom Mr. Logsdon could speak). In any event, suffice it to say that plaintiffs would not be entitled to summary judgment on this issue.

Even assuming, however, that Mr. Logsdon rescinded his authorization on Monday, March 19, 2001, plaintiffs have failed to show how AT&T's continued "control" over Fairway Hairstyling's phone number constitutes a violation of the anti-slamming statute. The language of the statute prohibits the unauthorized "change" of a consumer's telecommunications carrier; it does not speak to the continued "control" of a telephone line after the carrier has obtained authorization for the change. While plaintiffs seem to acknowledge that the express language of the statute does not contemplate liability for simply continuing to control a consumer's telephone line, plaintiffs urge that such control "must be considered as violative of the intent of the Kansas Legislature when it passed the anti-slamming law." Plaintiffs, however, have directed the court to no language in the statute that they deem ambiguous or otherwise subject to the interpretation pressed by them. Indeed, the Kansas Legislature is presumed to have expressed its intent through the language of section 50-6,103(b) itself. *See Doty v. Frontier Communications Inc.*, 272 Kan. 880, 884 (2001). Thus, when a statute is plain and unambiguous, courts will not speculate as to the legislative intent behind it and will not "read such a statute as to add something not readily found in the statute." *Id*. In this case, particularly in the absence of any argument from plaintiffs concerning what language they believe is ambiguous, the court concludes that section 50-6,103(b)

is unambiguous with respect to whether it subjects a telecommunications carrier to liability for simply continuing to control a consumer's line. A plain reading of the statute indicates that the statute subjects such a carrier to liability only when that carrier "change[s]" a consumer's carrier without that consumer's "express authorization." Thus, the court rejects plaintiffs' legislative intent argument.

Plaintiffs also urge that this court should find that defendant's continued control over Fairway Hairstyling's telephone line violates Kansas' anti-slamming law because "at least one other jurisdiction has recognized that the failure to restore telephone service is actionable." However,the case relied upon by plaintiffs, *Valdes v. Qwest Communications International, Inc.*, 147 F. Supp. 2d 116 (D. Conn. 2001), is easily distinguished from the situation presented here. In *Valdes*, the plaintiffs alleged that the carrier's failure to restore service within a reasonable period of time was an alleged deceptive act, and one specifically enumerated in the Connecticut Unfair Trade Practices Act; the plaintiffs did not assert that the carrier's conduct constituted "slamming" within the meaning of an anti-slamming statute. 147 F. Supp. 2d at 122. Stated another way, the state statute under which the *Valdes* plaintiffs sought to hold the carrier liable specifically imposed liability for continued control of a telephone line; the Kansas statute under which the plaintiffs here seek to hold AT&T liable does not impose such liability. Plaintiffs' effort to compare this case to *Valdes*, then, is totally unavailing.[4]

---

[4]At another point in their brief, plaintiffs direct the court to *Lovejoy v. AT&T Corp.*, 92 Cal. App. 4th 85 (2001) and suggest that the plaintiff in *Lovejoy* stated a claim for "slamming" based on his allegation that AT&T continued to control his phone number. This comparison, too, is misplaced because the plaintiff in *Lovejoy* alleged only a single cause of action for fraud; he did not allege a cause of action under the

To summarize, then, plaintiffs have simply not shown that defendant violated Kansas' anti-slamming statute at any time after defendant received Mr. Logsdon's authorization to convert Fairway Hairstyling's local telephone service to AT&T. Plaintiffs' motion for summary judgment, then, is denied and summary judgment in favor of defendant is warranted.

IV. Plaintiffs' Remaining Claims

As no reasonable jury could conclude that defendant AT&T attempted to convert plaintiffs' local telephone service without authorization, the resolution of defendant's motion for summary judgment with respect to plaintiffs' remaining claims becomes an easy task. Summary judgment is warranted on plaintiffs' claim for tortious interference with contract because plaintiffs cannot show that defendant acted "without justification." *See Reebles, Inc. v. Bank of America, N.A.*, 29 Kan. App. 2d 205, 211 (2001) (to recover damages for tortious interference with contract, plaintiff must establish that defendant acted without justification). Here, defendant was clearly justified in attempting to convert plaintiffs' local telephone service because Mr. Logsdon expressly authorized it to do so.[5]

---

state's anti-slamming statute. 92 Cal. App. 4th at 89-90.

[5]Plaintiffs assert that even if Mr. Logsdon authorized the change in service, he did not authorize a week-long interruption in service and, thus, AT&T had no justification for the continued interruption of plaintiffs' service. Plaintiffs' argument misses the point. Because defendant was justified in "interfering" with plaintiffs' contract with Southwestern Bell (assuming such a contractual relationship existed), AT&T cannot be held liable (at least under a theory of tortious interference with contract) based on conduct occurring after the interference. Stated another way, even assuming AT&T was not "justified" in causing a week-long interruption in service, such conduct fails to state a claim for tortious interference with contract, when AT&T was expressly authorized to "interfere" with the contract in the first place.

Summary judgment is also warranted with respect to plaintiffs' claim under the Kansas Consumer Protection Act, as that claim is duplicative of plaintiffs' claim under the anti-slamming statute, K.S.A. § 50-6,103. Indeed, the anti-slamming statute is actually a part of the Kansas Consumer Protection Act and a violation of the anti-slamming statute is considered a violation of the Kansas Consumer Protection Act. *See* K.S.A. §§ 50-6,103(e) & -6,103(i). Moreover, plaintiffs' claim under the Kansas Consumer Protection Act is based solely on defendant's alleged violation of the anti-slamming statute. *See* Pretrial Order at 16-17 (wherein plaintiffs state that they must show that defendant violated K.S.A. § 50-6,103(b), the anti-slamming statute, in order to recover under their claim that defendant violated the Kansas Consumer Protection Act) (July 29, 2003). For these reasons, summary judgment on this claim is appropriate.

V. Possible Sanctions Pursuant to Federal Rule of Civil Procedure 11

The record suggests that in presenting the foregoing matters to the court, plaintiffs and their counsel have acted for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, in violation of Rule 11(b)(1). The record also suggests that the claims and other legal contentions advanced by plaintiffs were not warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal or existing law or the establishment of new law, in violation of Rule 11(b)(2). Finally, the record suggests that plaintiffs' allegations, in large part, lacked evidentiary support and that, in responding to defendant's motion for summary judgment, plaintiffs have denied factual contentions without any factual basis for doing so, in violation of Rule 11(b)(3) and (4). Thus, the court hereby orders

plaintiffs' counsel to appear in court on October 21, 2003 at 2:30 p.m. and show cause to the court why he should not be sanctioned for violating Rule 11 when he signed and asserted unsupported and untenable claims on behalf of his clients under the state anti-slamming statute.

IT IS THEREFORE ORDERED BY THE COURT THAT plaintiffs' motion for summary judgment (doc. #58) is denied, defendant's motion for summary judgment (doc. #56) is granted, and plaintiffs' complaint is dismissed in its entirety.

IT IS FURTHER ORDERED BY THE COURT THAT plaintiffs' counsel shall appear before the court on October 21, 2003 at 2:30 p.m. and shall show cause to the court why he should not be sanctioned for violating Rule 11.

IT IS SO ORDERED.

Dated this 6th day of October, 2003, at Kansas City, Kansas.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge